
(2016) 12 RAJ CK 0050
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1290 of 2014

Assistant Provident Fund Commissioner	APPELLANT
Vs	
Shriram Rayons	RESPONDENT

Date of Decision : 02-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(f)

Citation : (2017) 1 WLN 137

Hon'ble Judges : Mr. Mohammad Rafiq, J.

Bench : Single Bench

Advocate : Mr. Deepak Goyal, Advocate, for the Petitioner; Mr. Sunil Nath, Advocate, for the Respondent No. 1

Final Decision : Allowed

Judgement

Mr. Mohammad Rafiq, J. - This writ petition has been filed by the Assistant Provident Fund Commissioner against order dated 06.09.2013 passed by Employees Provident Fund Appellate Tribunal, New Delhi(for short "the Appellate Tribunal"), which while allowing the appeal filed by Respondent No. 1 has set aside the order dated 28.01.2008 passed under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952(for short "the Act of 1952") assessing provident fund dues in respect of the eligible employees of Respondent No. 1 on account of Leave Encashment, Good Work Reward payments as well as non-extension of PF benefits to 20 car drivers.

2. Facts of the case are that the petitioner issued a notice dated 28.04.2005 under Section 7A of the Act of 1952 for non-extension of P.F. benefits to drivers engaged by Managers/Officers of Respondent No.1. Respondent No.1 filed its reply on 31.07.2006 with which relevant documents, i.e. office orders dated 24.01.2002 and 25.07.2002 passed by it were also enclosed. Respondent No.1 also led evidence by filing affidavits of General Manager namely V.K. Jaitly and drivers namely Amar Singh, Ranjit, Satya Narain. The petitioner required

Respondent No. 1 to submit list of drivers engaged by their Managers for their personal work. In response thereto, Respondent No.1 submitted letter dated 07.12.2007 wherein it reiterated its contentions and submitted that the Respondent No.1 does not have any list of drivers engaged by the Managers because they keep changing. However, it was prayed that such information would be collected from the Managers. However, vide letter dated 03.01.2008, Respondent No.1 submitted a list containing the names of the Managers and the drivers/helpers engaged by them from time to time during the period October, 1999 to June, 2005 on the basis of information provided to Respondent No.1 by the Managers concerned. The petitioner, after hearing both the sides, passed order dated 28.01.2008 under Section 7A of the Act of 1952 directing Respondent No.1 to enroll all eligible Drivers as P.F. subscribers and deposit the P.F. contribution in respect of all such drivers from their respective due dates within 15 days. Being aggrieved, Respondent No.1 filed appeal before the Appellate Tribunal, which has been allowed vide impugned order dated 06.09.2013 which is under challenge in this writ petition.

3. Mr. Deepak Goyal, learned counsel for the petitioner submitted that Enforcement Officer visited the premises of the Respondent No.1 on various dates from 27.05.2005 to 04.08.2005. The inspection report dated 04.08.2005 was prepared by the Enforcement Officer it stated that Respondent No. 1 is paying salary/wages to near about 20 drivers/helpers of their officers/executives and the same salary/wages is being entered in the cash book of the Respondent No.1 every month since October, 1999 onwards. Till now, payment of a total sum of Rs. 32,37,742/- has been shown in the cash book, but no PF benefits was ever extended to these 20 employees. When expenditure is made by the executives/managers personally and drivers/helpers have not been engaged by the Respondent No.1, then why the salaries/wages of drivers were being shown in the cash book, has not been extended. Such salary/wages is being paid by Respondent No.1 on monthly basis against bills/vouchers to the drivers directly and not to the managers/officers to whom they have been provided. Such modus operandi has been adopted by the employer as subterfuge to avoid PF liabilities and debar social welfare benefits to these poor drivers. Reliance has been placed on Division Bench judgment of the Bombay High Court in BASF India Limited and Another v. M. Gurusamy and Another, 2004 Vol. II LLJ page 500.

4. It is argued that internal perquisites categories have no meaning for the purpose of the Act of 1952. As per the definition of the employees given in Section 2(f) of the Act of 1952, persons who are employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, who gets, their wages directly or indirectly from the employer, are employees of the establishment. In the present case, drivers were getting their salary indirectly through executives/managers of Respondent No. 1, who are working in or in connection with the work of Respondent No.1. This work is also related to Respondent No.1 because the facility is being provided as perquisites categories and expenditure is reimbursed by the managers from Respondent

No.1, who is showing the same in the cash book. Therefore, the drivers are liable for PF membership. If the wages are given by Managers from their own pockets, there is no reason the personal expenditure of the managers be shown in the cash book of Respondent No.1.

5. Learned counsel for the petitioner further submitted that the Appellate Tribunal dismissed the appeal vide order dated 29.07.2011, in the absence of counsel of Respondent No. 1, but thereafter, their counsel filed an application for restoration of the appeal, which was restored vide order dated 15.05.2012. Thereafter, learned Appellate Tribunal, after hearing both the parties, allowed the appeal vide impugned order. It is argued that reliance placed by the Tribunal on the judgment of the Supreme Court in Punjab National Bank v. Gulam Dastagir, (1978) 2 SCC 358 and judgment of Delhi High Court in Titan Industries Limited v. Kishan Lal, (2007) 137 DLT 566 is wholly misconceived. Ratio of these judgments is not applicable to the present case. These two cases were based on the provisions of the Industrial Disputes Act, 1947. Definition of "employee" under the Industrial Disputes Act, 1947 and the Act of 1952 is totally different. The Appellate Tribunal has thus erred in applying these judgments in the present case. It is argued that the Appellate Tribunal had earlier dismissed the appeal on merits ex-parte vide order dated 29.07.2011 and restored the appeal vide order dated 15.05.2012 whereas as per proviso to Rule 15(2) of the Employees' Provident Fund Appellate Tribunal(Procedure) Rules, 1997, if the appeal is decided on merits, the decision shall not be reopened except by way of review. Therefore, the Appellate Tribunal committed serious mistake in restoring the appeal in violation of the aforesaid provision. The Tribunal failed to consider the fact that 20 drivers themselves have stated in their affidavits that they drop managers from their residence to factory and bring back to their residence. It cannot be, therefore, said that there is some connection with the work of Respondent No.1. Learned counsel placed reliance on the judgment of this Court in Railway Employees Co-op Banking Society v. Union of India, (1980) LIC 1212 (Raj.) wherein it has been held that even part time workers would be employees, who worked twice or thrice in a week.

6. Learned counsel further argued that the Appellate Tribunal erred in law in holding that there is no control or supervision over drivers by the Respondent No.1, therefore, drivers are not employees of Respondent No.1. Reliance in this connection has been placed on the judgment of the Supreme Court in Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments, 1973 II LLJ 495 wherein it has been held that in order to decide relationship of employer and the employee, the test of right to control cannot be treated as an exclusive test and it is not necessary that the servant should be under exclusive control of one master. Even if, in the present case, there is no direct control of Respondent No.1 over drivers, but the respondent indirectly holds the control over drivers. It is argued that the provident fund and other contributions have to be deposited by the employer by the 15th of the next month in which the employee has worked in establishment and the dues become payable to him because the

worker has already performed the employment up to last day of the previous month. The contributions have to be deposited by the employer/establishment only after beneficiary worker has already worked and thus earned this amount in terms of the contract of employment and the provisions of the Act of 1952. Reliance is placed on the judgment of the Supreme Court in *RPFC v. Shibu Metal Workers*, 1964-65 (27) FJR 491 wherein while considering the provisions of the Act, it was held by the Supreme Court that if two views are possibly, the Courts should prefer the view which helps the achievement and furtherance of the object. In *State v. Girdhari Lal Bajaj*, 1962 II LLK 46 (Bom. DB), the Bombay High Court observed that when there is doubt about their meaning, it is to be understood in the sense, in which it best harmonies with the subject of the enactment and the object which the legislature had in view. Reliance has been placed on judgment of Gujarat High Court in *Satish Plastic v. Regional Provident Fund Commissioner*, 1982 (4) FLR 207 and judgment of Patna High Court in *Saharsa Zila Khadi Gramodyog Sangh and Another v. Union of India and Others*, 1996 (72) FLR 279. Learned counsel for the petitioner argued that judgment of the Supreme Court in *Punjab National Bank v. Ghulam Dastagir*(supra), which is relied by Division Bench of Bombay High Court in *BASF India Limited and Another*(supra), arose out of the provisions of Industrial Disputes Act and cannot be applied to the case pertaining to the provisions of the Act of 1952.

7. Mr. Sunil Nath, learned counsel for Respondent No.1 opposed the writ petition and argued that stand of Respondent No. 1 before the Appellate Tribunal was that it has been complying with the provisions of the Act of 1952 and depositing contributions regularly and in time. Respondent No.1 is giving perquisites to its officers, flexibility to them for choosing the various perquisites as per their individual requirements. These perquisites are categorized in two categories, namely (a) non discretionary and (b) optional. Under the option perks category, the sum total of the perquisites under different categories is limited to a fixed limit and it is the option of the officer concerned to claim perquisites under various heads in the category. One of the items covered under the optional category is "driver expenses" under which an officer may or may not draw the perquisite. The essential feature of this optional category is that officers are free to choose the perquisites under any particular item. It is therefore the officer's choice to engage, or not to engage a driver, which is for his personal and family's use and comfort. He may not engage the driver and claim perquisites under any other item. Further stand of the respondents was that the drivers so engaged by the officers of the Respondent No.1 as part of additional perquisites, do not work for the Respondent No.1. They also do not work in connection with the work of the Respondent No.1. Rather, they work for the officers, who employ them are not available to the Respondent No.1 for taking any work of driving from them. Drivers work at the residence of the officers concerned. However, the officer, who engages a driver, claims the salary paid by him to the driver as reimbursement from the Respondent No.1 on production of valid cash memo and subject to the overall entitlement of perquisite fixed for the officer.

8. It is argued that there is no supervision or control of Respondent No.1 over the working of the drivers engaged by its officers/managers. Respondent No. 1 neither appoints them, nor terminates their services and/or take any disciplinary action against them for any of their omissions and commissions. Reliance is placed upon the judgment of the Supreme Court in Punjab National Bank v. Gulam Dastgir(supra), judgment of Delhi High Court in Titan Industries Ltd. v. Kishan Lal(supra). It is argued that scope of this Court under Articles 226 and 227 of the Constitution of India is limited. It can set aside orders passed by the trial court/revisional court only on limited grounds namely illegality and impropriety in the findings recorded by the court below. Learned counsel argued that writ petition is not maintainable as it is not filed by the State Board as constituted under Section 5B of the Act of 1952. State Board is required to issue an authority letter in favour of concerned person to file writ petition before this Court. However, present writ petition has been filed by Assistant Provident Fund Commissioner.

9. I have given my anxious consideration to rival submissions and carefully examined the material on record.

10. I may at the outset observe that objection as to maintainability of the writ petition only because the petition has not been filed by the State Board or the letter of authority has not been signed by the State Board cannot be upheld because the petition filed by the APFC can as well be entertained and in fact, have been entertained in the past too. This objection should not therefore dilute the Court from examining the matter on merits, particularly when the respondent No. 1 itself filed the appeal before the Tribunal impleading the petitioner as respondent.

11. Perusal of the impugned order passed by the Appellate Tribunal reveals that it has conducted proceedings of the appeal in the manner where it has heavily relied upon the definition of employee as given under Section 2(f) of the Act of 1952 and observed that person engaged in or in connection with the work of establishment and who gets his wages directly or indirectly from employer is employee of the establishment. In this case, the drivers are working in connection with the work of the establishment of Respondent No.1. Besides, order passed by the Appellate Tribunal reveals that they are being paid by the employer, therefore, they have been rightly treated as employees of the establishment.

12. The Supreme Court in Punjab National Bank v. Ghulam Dastagir(supra) was dealing with a case, which although arose out of provisions of the Act of 1947, where definition of workman as given under Section 2(s) of the Act of 1947 was noticed, but the facts of that case were somewhat similar to the present case. Respondent Ghulam Dastagir was driver of the management-bank. Industrial Dispute was between individual driver Ghulam Dastagir and the management Punjab National Bank. Management terminated services of the respondent therein and industrial dispute was referred to the Industrial Tribunal as to the

legality of the termination of the respondent-workman. Industrial Tribunal answered the reference in favour of the workman directing his reinstatement with back wages. In appeal before the Supreme Court, the management contended that the driver was not employed by the Bank. The employer was the Area Manager, who had been given a personal allowance of Rs. 200/- by the Bank to enable him to employ a personal driver of his own choice. Amount of Rs. 200/- was the maximum allowance payable and if the expense incurred by the Area Manager was less than Rs. 200/- the allowance would be reduced to the actual extent and if the amount exceeds limit of Rs. 200/-, the excess amount was to be incurred by the Area Manager. It was held that car driver engaged by Area Manager of Bank, for which allowance was given to him, was not workman of the Bank, even though the car was maintained at the Bank's expense. The control and direction of the driver did not rest in bank.

13. Division Bench of Bombay High Court in BASF India Limited and Another(supra) relying on the judgment of the Supreme Court in Punjab National Bank v. Ghulam Dastagir(supra) and definition of employee given in Section 2(f) of the Act of 1952 observed in para 8 and 9 as under:

"8. A reading of the said definition would show that any person who is employed for wages in any kind of work, manual or otherwise, in an establishment and who gets his wages directly or indirectly from the employer is an employee. Similarly, an employee who is employed for wages in any kind of work, manual or otherwise, in connection with the work of an establishment and who gets his wages directly or indirectly from the employer is also an employee. It would also include any person employed by or through a contractor in or in connection with the work of the establishment. It would also include any person engaged as an apprentice not being an apprentice engaged under Apprentices Act, 1961 or under the Standing Orders of establishment.

9. The expression "in connection with the work of establishment" means that there must be some nexus between the establishment and work of the employee, though it may be loose connection. The work should not be irrelevant for the purposes of establishment. It is sufficient if it is incidental to it as held by the Supreme Court in Royal Talkies(supra). It is enough if the employee does some work which has relevance to or link with the establishment. In other words such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Applying the aforesaid test to the instant case, it would be seen that the cars are provided to the Managers by the Company. All the 21 Managers have 21 drivers. They are paid wages upto Rs. 1,900/- or Rs. 1,950/-, as the case may be, depending on the length of service put in by such drivers. The payment made by the Managers to the drivers is reimbursed for to and fro drive between the residence and the office or outside place for office work. Such drivers are also paid overtime if the Managers use drivers for Company's duty beyond the driver's normal working hours with the management. These personal drivers are provided uniforms, footwear, monsoon

equipments and winter clothing. Obviously, the reimbursement to the drivers of the Managers is done by the Company because the drivers are engaged by the Managers for the benefit of the Company. The material placed before the Commissioner amply showed and established that the drivers were paid directly or indirectly by the Company for the work carried out in or in connection with the Company. We are not persuaded by the submission of Mr. Cama that the Company does not pay wages to the drivers of the Managers and what is reimbursed to the Managers is not the wages paid by the Managers to the drivers but the reimbursement is made by way of perquisites and, therefore, such drivers do not fall within the definition of "employee" under Section 2(f) of the Act of 1952. In our considered view the form of payment made to the Managers is not very important but what is important is what is reimbursed to the Managers is nothing but the payment made by the Managers to such drivers for the services rendered by the drivers in connection with the work of the Company. We may note that the Commissioner in his order dated July 8, 1992 noticed the following circumstances for holding the concerned drivers the employees of the Company:

- (i) 21 car drivers are employed by the 21 Managers in possession of the Company :
- (ii) the personal drivers are paid wages up to Rs. 1,900/- per month and up to Rs. 1,950/- per month if their services with the Managers is less than five years or five years or more respectively;
- (iii) the personal drivers are provided uniforms, footwear, monsoon equipments and winter clothing;
- (iv) such drivers are paid overtime;
- (v) the cars are provided to the Managers by the establishment;
- (vi) these drivers do service to the individual managers for the official purpose.

Taking cumulative effect of these aspects the Commissioner held that there was no need for the establishment to have reimbursed the Managers towards the expenses for engaging these drivers had they not been engaged for the benefit of the establishment. The finding thus concluded by the Commissioner that these facts would prove that the concerned drivers are paid wages directly or indirectly by the establishment for the work carried out by them in or in connection with the establishment and, therefore, they are nothing but employees as defined under Section 2(f) of the Act of 1952 cannot be faulted."

14. Judgment of Patna High Court in Saharsa Zila Khadi Gramodyog Sangh and Another(supra) relied by the petitioner is distinguishable on the facts of the present case. In that case, khadi was being manufactured by the workers at their own homes and supplied to the Khadi Gramodyog Sangh. It was held that provisions of Act of 1952 would not apply to them as also to the Khadi industry.

15. Gujarat High Court in M/s. Satish Plastic(supra) had considered definition of employee under Section 2(f) of the Act of 1952 and held that inclusive part of the definition makes it clear that even if the person concerned has been employed through a contract in or in connection with the work of establishment, he would yet fall within the description of "employee" within the meaning of the Act. In that case accountant working at home was held to be employee as per the definition of employee under Section 2(f) of the Act of 1952.

16. In view of the law laid down by the Supreme Court in Punjab National Bank v. Ghulam Dastagir(supra) and Bombay High Court in BASF India Limited and Another(supra), the drivers cannot be said to be totally strangers because they are being engaged through managers and working under their supervision and such facility is being provided by Respondent No.1 and their salary and other expenses on month to month basis are borne by Respondent No.1. On facts, they must be held employees of the Respondent No.1, as the control test is not exclusive and only test to determine master and servant relationship. Definition of employees as given under Section 2(f) of the Act has rightly been interpreted by Division Bench of Bombay High Court in BASF India Limited and Another(supra) to mean that any person, who is employed for wages in any kind of work, manual or otherwise, in an establishment and who gets his wages directly or indirectly from the employer, is an employee. It would also include any person employed by or through a contractor in or in connection with the work of the establishment.

17. In the facts of present case, it must be held that drivers were engaged in connection with the work of establishment of the Respondent No. 1 because they worked under the perquisites provided to the managers. Contention of Respondent No. 1 that there was certain monetary limit for making provision of such perquisites in which an officer may or may not draw the perquisite and decide to not to avail facility of driver, in view of this Court, is hyper technical approach because herein actually the drivers were provided to the officers/managers and their salary and other expenses were borne by the Respondent No.1.

18. In view of above, writ petition is allowed. Impugned order is set aside and order dated 28.01.2008 passed by Assistant Provident Fund Commissioner, Kota is restored. Consequences to follow.